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9 CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD

10  
11 SAN DIEGO REGION

12 IN RE TENTATIVE CLEANUP AND  
13 ABATEMENT ORDER NO. R9-2011-  
0001 (formerly No. R9-2010-0002)

**BAE SYSTEMS SAN DIEGO SHIP  
REPAIR, INC.'S REPLY TO THE SAN  
DIEGO UNIFIED PORT DISTRICT'S  
COMMENTS REGARDING THE  
TCAO/DTR NO. R9-2011-0001**

14  
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17 Presiding Officer: Grant Destache  
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1 Pursuant to the Notice of Extended Comment Period and Revised Comment Format, dated  
2 May 12, 2011, and the Third Amended Order of Proceedings, dated May 18, 2011, Designated  
3 Party BAE Systems San Diego Ship Repair, Inc. ("BAE Systems") respectfully submits the  
4 following Reply to the San Diego Unified Port District's ("Port District") Submission of  
5 Comments, Evidence and Legal Argument, submitted May 26, 2011, concerning the Draft  
6 Technical Report ("DTR") for Tentative Cleanup and Abatement Order No. R9-2011-0001  
7 ("TCAO") for the San Diego Bay Shipyard Sediment Site, San Diego County ("Shipyard  
8 Sediment Site" or "Site").

9 **I. INTRODUCTION AND FACTUAL BACKGROUND**

10 **A. Port District as Lessor**

11 From the early 1900s until 1962, the City owned and leased what is now the BAE  
12 Systems Leasehold to a host of industrial tenants. The Port District, which was created by statute  
13 in 1962, now holds and manages the BAE Systems Leasehold as trust property on behalf of the  
14 People of the State of California. The Port District likewise leased the BAE Systems Leasehold  
15 to industrial tenants unrelated to BAE Systems from 1962 to 1979 (1985 for the South end of the  
16 yard).

17 The lease agreement between BAE Systems and the Port District requires that BAE  
18 Systems use the leasehold exclusively for shipbuilding and repair and related marine activities,  
19 authorizes the Port District to suspend operations under certain circumstances, prohibits BAE  
20 Systems from assigning or subleasing the site without the Port District's permission, permits the  
21 Port District to inspect the leasehold, permits the Port District to approve or deny termination of  
22 the lease by BAE Systems, and permits the Port District to terminate the lease for violations of  
23 the lease's terms and conditions. (*See* SAR 057580-057608 [1979 Southwest Marine Lease]; SAR  
24 057609-057640 [Southwest Marine Agreement for Amendment of Lease No. 1].) The lease  
25 further acknowledges that BAE Systems' tenancy provides to the community water front  
26 employment, tax revenue, as well as lease income. (*Id.*)

27 A number of industrial tenants unrelated to BAE Systems previously leased the premises  
28 under lease terms similar to the Port District's lease with BAE Systems. Certain of those entities

1 are defunct, recalcitrant and/or not participating in these proceedings.

2 In addition to its management of the land currently identified as the BAE Systems  
3 Leasehold, the Port District also manages land currently occupied by NASSCO, as well as the  
4 cooling water tunnels for SDG&E's former Silver Gate Power Plant. (TCAO Finding 11; DTR  
5 § 11.1.)

6 **B. Port District's Primary Liability as Owner and Operator**

7 Because the Port District (1) was responsible for the use and maintenance of the land  
8 currently leased by NASSCO, BAE Systems, and SDG&E and the land formerly leased by San  
9 Diego Marine Construction Co., Star & Crescent and Campbell; (2) had knowledge of the  
10 potential for discharges from the leased properties to materially contribute to accumulations of  
11 pollutants in the San Diego Bay; and (3) had the requisite degree of control over its tenants'  
12 activities, the DTR correctly concludes that the "the Port District caused or permitted waste to be  
13 discharged into San Diego Bay, creating a condition of pollution and/or nuisance in the Bay at the  
14 Shipyard Sediment Site . . . ." (TCAO Finding 11; DTR § 11.1.) As such, the DTR names the  
15 Port District as a "discharger, . . . consistent with its responsibility for the actions, omissions and  
16 operations of its tenants." (*Id.*)

17 As a separate and independent basis for primary liability, the Port District also owns and  
18 operates a municipal storm sewer system (MS4). (TCAO Finding 11; DTR § 11.3.) The Port  
19 District is a co-permittee of current and prior NPDES Storm Water Permits that regulate the MS4  
20 drains which outfall on the BAE Systems Leasehold (SW4) and the NASSCO Leasehold (SW9).  
21 (*Id.*) The DTR concludes that the Port District, through its MS4 conveyances, has discharged  
22 urban storm water containing waste directly to San Diego Bay at the Shipyard Sediment Site.  
23 (TCAO Finding 11; DTR § 11.4.) The Port District admits the same. (Port District comments, at  
24 17.)

25 **II. LEGAL STANDARD FOR NAMING DISCHARGERS**

26 In 1969, the California legislature enacted the Porter-Cologne Water Quality Control Act,  
27 Cal. Water Code §§ 13000-14958 (hereinafter, the "Act"), with the declared objective of ensuring  
28 "that the quality of all the waters of the state shall be protected for use and enjoyment by the

1 people of the state.” Cal. Water Code § 13000. With this objective in mind, the Act grants the  
2 Regional Board broad latitude to issue Cleanup and Abatement Orders (“CAOs”) when necessary  
3 to protect California’s valuable and limited water resources from contamination. Cal. Water  
4 Code § 13304(a). Specifically, the Act provides that the Regional Board may order cleanup and  
5 abatement by the following: (1) “any person who has discharged or discharges waste into the  
6 waters of this state in violation of any waste discharge requirement or other order or prohibition  
7 issued by a regional board or the state board;” or (2) any person “who has caused or permitted,  
8 causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it  
9 is, or probably will be, discharged into the waters of the state and creates, or threatens to create, a  
10 condition of pollution or nuisance.” *Id.*

11 The regulations governing the investigation and issuance of CAOs further require that the  
12 Regional Board name other dischargers to the maximum extent permitted by law. *See* 23 Cal.  
13 Code Regs. § 2907; *See also* State Water Board Resolution No. 92-49, “Policies and Procedures  
14 for Investigation and Cleanup and Abatement of Discharges under Water Code Section 13304,” at  
15 § II(A)(4).

16 The Regional Board is granted this broad authority precisely because of situations, such as  
17 the one here, where contamination is discovered many years after the events causing the  
18 contamination. As stated by a leading treatise on California environmental law: “Due to the  
19 passage of time and the difficulty of interpreting hydrogeologic evidence, it often is impossible to  
20 establish who is responsible for the contamination with a great degree of certainty.” Kenneth A.  
21 Manaster and Daniel P. Selmi, *California Environmental Law and Land Use Practice*,  
22 § 32.32(1)(a), at p. 32-42.

23 **III. THE DTR PROPERLY CONCLUDES THAT THE PORT DISTRICT SHOULD**  
24 **BEAR PRIMARY RESPONSIBILITY**

25 The DTR properly concludes that the Port District “should not bear merely secondary  
26 responsible at this time.” The DTR finds that the Port District should be held responsible “to the  
27 extent the Port’s tenants, past and present, have insufficient financial resources to cleanup the  
28 Shipyard Sediment Site and/or fail to comply with the order.” (TCAO Finding 11; DTR § 11.2.)

1 The Port District does not appear to dispute that it should be named as a discharger due to  
2 its capacity as a landlord of tenants identified in the TCAO as dischargers. (Port District  
3 Comments at 7.) Nevertheless, the Port District contends that it is entitled to status as a  
4 secondarily responsible party because “[t]he Port’s tenants have more than sufficient assets to  
5 conduct the cleanup.” (*Id.* at 8.) There are a number of issues with the Port District’s position  
6 that render it incorrect.

7 **A. The Port District Bears the Burden of Demonstrating That its Current and**  
8 **Former Tenants Have Sufficient Assets to Conduct the Cleanup**

9 As an initial matter, the Port District’s comments reflect a fundamental misunderstanding  
10 of the allocation of burdens in a secondary liability inquiry. The Port District asserts that the  
11 prior iterations of the TCAO did not name the Port District as a primary discharger “because of its  
12 determination that the Port’s tenants had adequate assets to conduct the cleanup and were  
13 cooperating.” (Port District Comments at 8.) To the contrary, the prior iterations of the TCAO  
14 noted only that there was “no evidence at this time indicating that [the Port’s tenants] have  
15 insufficient financial resources to cleanup the Shipyard Sediment Site.” (SAR 375780, at  
16 372818-375819.) These prior iterations improperly placed the burden of demonstrating the Port  
17 District’s entitlement to secondary liability status on the Port District’s tenants. The Presiding  
18 Officer, however, has correctly ruled that as the party seeking status as a secondarily responsible  
19 party, *it is the Port District’s burden* to demonstrate that its current and former tenants have  
20 sufficient assets to cover the cleanup. (October 27, 2010 Order Reopening Disc. Period, at § III.)

21 **B. The Port District has Failed to Meet its Burden**

22 The DTR’s conclusion that the Port District should be named primarily responsible is  
23 correct because the Port District has failed to meet its burden of establishing that equitable  
24 reasons justify imposing secondary liability. Secondary liability is appropriate, if at all, in cases  
25 where there are equitable reasons that justify imposing different liability on the relevant parties.  
26 *See, e.g., In the Matter of the Petitions of Arthur Spitzer et al.*, Order No. 89-8, at p. 25 (holding  
27 that it would be inappropriate to name a successor entity as “secondarily” liable when its  
28 predecessor entity released contaminants which polluted the waters of the State).

1                   1.     **BAE Systems has No Liability for Any Pre-1979 Discharges Including**  
2                   **"Orphan Shares"**

3                   BAE Systems does not dispute, and in fact has stipulated, that it has the financial assets to  
4 cover amounts of the cleanup and remedial monitoring under the TCAO which are based on BAE  
5 Systems' post 1979 tenancy at the Leasehold and which are ultimately allocated to BAE Systems.  
6 The Port District erroneously asserts that it believes BAE Systems should also have to fund  
7 cleanup and remedial monitoring costs that are attributable to former tenants of the BAE Systems  
8 Leasehold who are unable or unwilling to pay for their own share of the cleanup effort. That  
9 position is factually and legally incorrect.

10                  Here, BAE Systems is not the successor entity to any of the entities that operated on the  
11 BAE Systems Leasehold prior to 1979. BAE Systems had no connection to the BAE Systems  
12 Leasehold prior to 1979 when it entered into its lease with the Port District. Accordingly, BAE  
13 Systems is not a "discharger" under section 13304 of the Act for any pre-1979 discharges. The  
14 Port District, on the other hand, remains primarily liable for any pre-1979 discharges to the extent  
15 its tenants for any applicable time period are unable or unwilling to fund the cleanup of  
16 discharges attributable to such time period.

17                  Where the operator responsible for the discharge is no longer in existence or not cleaning  
18 up the site, thus creating a so called "orphan share," the landowner is considered the "discharger"  
19 and is primarily liable for remediating the site. *In the Matter of the Petitions of Aluminum*  
20 *Company of America et al.*, Order No. 93-9, at pp. 16-18. "The Board has cited several factors  
21 which are appropriate for the Regional Water Boards to consider in determining whether a party  
22 should be held secondarily liable. These include: (1) whether or not the party initiated or  
23 contributed to the discharge; and (2) whether those parties who created or contributed to the  
24 discharge are proceeding with cleanup." *Id.* at p. 16 (citations omitted). As the DTR properly  
25 concludes, both factors cut against finding the Port District merely secondarily liable. As  
26 discussed above, the lease provisions gave the Port District significant control over the activities  
27 of the former tenants of the BAE Systems Leasehold. By permitting these entities to discharge,  
28 unabated, for a number of years, the Port District contributed to the discharge. As to the second

1 factor, the ability of all of the parties to pay for their respective shares of the cleanup is far from  
2 clear at this time. Even the Port District concedes as much, noting that “the Star & Crescent  
3 entity that is currently named in the TCAO and DTR disputes its successor liability for the other  
4 predecessor entities that operated at the Shipyard Sediment Site.” (Port District’s comments at  
5 11.) Indeed, the successor liability analysis utilized in the DTR to find Star & Crescent to be the  
6 successor to San Diego Marine Construction Company’s liability is debatable, and is the subject  
7 of a pending motion for summary judgment by Star & Crescent in the federal action. Thus, to the  
8 extent these entities are not and cannot comply with the CAO, which certainly appears likely at  
9 least with respect to San Diego Marine Construction Company (1962-1972), and potentially  
10 Campbell (1972-1979), the Port District is responsible. Accordingly, it is appropriate for the Port  
11 District to be considered *primarily* liable for compliance with the TCAO unless and until those  
12 parties fully comply with the final order.

13 Although it appears to concede liability for any “orphan shares,” the Port District attempts  
14 to escape liability by claiming that its tenants, including BAE Systems, “have lease and permit  
15 terms obligating the tenants to defend and indemnify the Port against this type of liability.” (Port  
16 District’s comments at 9.) With respect to BAE Systems, this is patently false. The Hold  
17 Harmless provision in the Southwest Marine lease upon which the Port District relies, was  
18 superseded and replaced entirely with a different Hold Harmless provision that precludes the Port  
19 District’s argument.<sup>1</sup> The Second Amendment to the lease expressly amends the First  
20 Amendment by “deleting therefrom Paragraphs...21...in [its] entirety and substituting in lieu  
21 thereof Paragraphs...21...as follows.” (See Second Amendment to Southwest Marine Lease, at  
22 ¶ 21.)<sup>2</sup> It then states:

23 21. HOLD HARMLESS: Lessor, and its agent, officers, and  
24 employees shall, to the full extent allowed by law, be held by  
25 Lessee free and harmless from and indemnified against any liability  
26 pertaining to or arising out of the use and operation of the premises  
by Lessee and any costs of expenses incurred on account of any  
claim or claims therefore, including reasonable attorney’s fees.

27 <sup>1</sup> The Hold Harmless provision contained in ¶ 20 of the Southwest Marine lease was slightly changed and became  
28 ¶ 21 in the First Amendment to the Lease. (See SAR 057609 [First Amend.ment to Southwest Marine Lease, at  
¶ 21].)

<sup>2</sup> Submitted by BAE Systems into the Administrative Record concurrently with this Reply.

1 Nothing herein is intended to exculpate Lessor from its sole active  
2 negligence or willful misconduct.

3 (*Id.* (emphasis added).) This Hold Harmless provision requires only that BAE Systems indemnify  
4 and hold harmless the Port District for liability arising out of BAE Systems' use and operation of  
5 the premises, not prior lessees' use and operation of premises. A written modification of the  
6 terms of a contract "supersedes those terms to which it relates." *Thiele v. Merrill Lynch, Pierce,*  
7 *Fenner & Smith*, 59 F. Supp. 2d 1060, 1064 (S.D. Cal. 1999). Because the Hold Harmless  
8 Provision in the Second Amendment completely superseded all prior Hold Harmless Provisions,  
9 BAE Systems has no obligation to defend and indemnify the Port District for any liability arising  
10 out of any "orphan shares."

11 2. **Mere Reference to Historical Insurance Policy Limits Fails to**  
12 **Demonstrate Applicability or Availability of Any Assets**

13 The Port District asserts, without support, that it "believes BAE has tens of millions of  
14 dollars of historic liability coverage that would be potentially applicable to the remediation and  
15 monitoring efforts." (Port District's comments at 9 (emphasis added).) As support for its  
16 "belief," the Port District relies exclusively on a summary of "BAE Historic Liability Insurance"  
17 that it includes in its comments to the Regional Board.<sup>3</sup> The same reliance is made with respect  
18 to historical insurance summaries for other parties, also prepared by the Port District.

19 However, the Port District merely cites to what it says are policy *limits* for historical  
20 policies. The Port District makes *no showing whatsoever* (1) whether the policy provides actual  
21 coverage for the claims and anticipated obligations at issue here, (2) whether the insurer is  
22 defunct or insolvent, (3) whether any policy amounts have been sold back or are otherwise  
23 unavailable, and (4) most importantly, whether any insurer for any party has *actually accepted*  
24 *coverage for indemnity obligations*. This lack of evidence is unsurprising, as courts have  
25 consistently held that the obligation to indemnify does not arise until the insured's underlying

26 <sup>3</sup> See Ex. 10 to Port District's Comments. This insurance summary, created by the Port District, should be  
27 disregarded by the Regional Board as it contains information that was submitted in this proceeding by the Port  
28 District in direct violation of the Protective Order in the related federal proceeding. That information is currently the  
subject of a motion before the Discovery Referee, and pursuant to the terms of the Protective Order the disputed  
information remains confidential during the pendency of those proceedings.

1 liability is established. *See, e.g., Montrose Chemical Corp. v. Admiral Ins. Co.*, 10 Cal. 4th 645,  
2 659 n.9 (1995). Without any such evidence or showing, the Port District's "belief" as to BAE  
3 Systems' and other dischargers' "potential" insurance assets is unsupported, insufficient, and  
4 certainly is not evidence upon which the Regional Board can or should change the Port District's  
5 status to that of a secondarily responsible party.

6 The Regional Board has a broad duty to name all dischargers in CAOs to the maximum  
7 extent permitted by the Water Code. Because the Port District has failed to demonstrate that its  
8 tenants, including BAE Systems, are obligated to conduct the cleanup attributable to any orphan  
9 shares or have sufficient assets to do so, the DTR's conclusion that the Port be named a primarily  
10 responsible party is correct.

11 **C. Any Change in the Port District's Liability Status Would be Premature**

12 It is premature for the Regional Board to determine whether the Port District's current and  
13 historical tenants have sufficient financial resources to remediate the Site because the remediation  
14 costs have not yet been finally or specifically determined. Until the remediation is underway, it  
15 is inappropriate for the Regional Board to alter the primarily versus secondarily liability of  
16 designated parties. *See In re Wenwest, Inc.*, State Water Resources Control Board Order No. WQ  
17 92-13, at 3 n.2. Moreover, it cannot be determined whether any designated party "fails to comply  
18 with the order" unless and until the final CAO has been issued and a party fails to comply with  
19 those directives. (DTR § 11.2.) It is the Port District's burden to establish it is not primarily  
20 liable. *See* § III-A, *infra*. The Port District has failed to meet its burden.

21 **IV. THE DTR PROPERLY CONCLUDES THAT THE PORT DISTRICT'S MS4**  
22 **FACILITIES HAVE AND ARE DISCHARGING WASTE TO SAN DIEGO BAY**  
23 **CREATING POLLUTION, CONTAMINATION AND NUISANCE CONDITIONS**

24 The Port District contends that it cannot be named as a discharger as a result of its  
25 ownership of its MS4 facilities because "[t]he DTR contains no evidence that Port discharges  
26 from its MS4 are contributing to the Shipyard Sediment Site contamination." (Port District's  
27 comments at 15.) "There is no evidence that SW4 or SW9 discharged any pollutants," the Port  
28 District claims. (*Id.* at 17.) The Port District's positions, however, are incorrect. There is  
substantial and reasonable evidence to support the DTR's assertion that the Port District's

1 discharges into and through the SW4 storm drain outfall have contributed to elevated levels of  
2 pollution at the BAE Systems Leasehold.

3 **A. Regional Boards Should Review Evidence with a View Towards Liability**

4 To be named as a discharger, all that is required is “sufficient evidence” of responsibility.  
5 See The State Board Water Quality Enforcement Policy, No. 2002-0040, (Feb. 19, 2002). To this  
6 end, “a regional water board shall “[u]se any relevant evidence, *whether direct or circumstantial*”  
7 in order to establish the source of a discharge. State Water Board Resolution No. 92-49, at  
8 § II(A) (emphasis added). The resolution provides a number of potential sources of evidence,  
9 including site characteristics and location in relation to other potential sources of a discharge;  
10 hydrologic and hydrogeologic information, such as differences in upgradient and downgradient  
11 water quality; industry-wide operational practices that have led to discharges, such as conveyance  
12 systems; and physical evidence, such as analytical data. (*Id.*)

13 In light of the Act’s declared objective and the broad discretion granted to regional water  
14 boards by the Act and its implementing regulations, State Water Board decisions suggest that a  
15 regional water board should look at evidence with a view toward finding liability. According to  
16 the State Water Board, “[g]enerally speaking it is appropriate and responsible for a Regional  
17 Board to name all parties for which there is reasonable evidence of responsibility, even in cases of  
18 disputed responsibility.” See, e.g., *Exxon Company U.S.A. et al.*, Order No. 85-7, at 11 (SWRCB  
19 1985) (noting further that “substantial evidence” means “credible and reasonable evidence which  
20 indicates the named party has responsibility”); *Stinnes-Western Chemical Corp.*, Order No. 86-  
21 16, at 12 (SWRCB 1986) (same).

22 **B. NRDC is Inapposite and Does Not Apply the Evidentiary Standard Applicable**  
23 **in Administrative CAO Proceedings**

24 The Port District heavily relies on *Natural Res. Def. Council, Inc. v. County of Los*  
25 *Angeles*, 636 F.3d 1235 (9th Cir. 2011) (hereafter “NRDC”) to argue that the evidence upon  
26 which the DTR relies is inadequate. This case is of no relevance here. In *NRDC*, the plaintiffs  
27 sought to impose liability on municipal defendants for violations of the Federal Clean Water Act  
28 for what the plaintiffs contended were exceedances of the water-quality standards contained in the

1 defendants' respective NPDES permits. (*Id.*) The evidence required to demonstrate an unlawful  
2 exceedance is different from the evidence required to be named as a discharger in a cleanup and  
3 abatement order. As noted, the Regional Board has broad discretion to name dischargers in a  
4 cleanup and abatement order, and all that is required to exercise that discretion is "credible and  
5 reasonable evidence which indicates the named party has responsibility." *See, e.g., Exxon*  
6 *Company U.S.A. et al.*, Order No. 85-7, at 12 (SWRCB 1985). It is for this reason that courts  
7 review agency decisions under an abuse of discretion standard. *See Topanga Association for a*  
8 *Scenic Community v. County of Los Angeles*, 11 Cal. 3d 506, 515 (1974) (noting that the agency  
9 which renders the challenged decision is only required to "set forth findings to bridge the analytic  
10 gap between the raw evidence and ultimate decision or order"). Thus, the Ninth Circuit's  
11 assessment of the degree of proof necessary to hold an entity liable for a NPDES Permit  
12 exceedance has no bearing on the evidence required to name the Port District as a discharger in  
13 the TCAO, and consequently *Natural Res. Def. Council* is fundamentally distinguishable and  
14 should be disregarded.

15 Moreover, *Natural Res. Def. Council* is inapposite because it is an action brought under  
16 the Clean Water Act centered on whether a NPDES permittee had violated the NPDES permit  
17 limits. Conversely, in the instant action, the issue is whether the Port District discharged  
18 contaminants to the Site that have contributed to the contamination. The DTR makes clear that  
19 urban runoff from the Port's MS4 facilities has been discharged to the Site, contributing to the  
20 contamination by exceeding applicable water quality objectives for the Bay. (DTR, Finding 11.)  
21 The DTR does not allege the Port District violated its NPDES permit.

22 Even if the *Natural Res. Def. Council* case has any applicability to these proceedings, the  
23 Ninth Circuit's ruling does not relieve the Port District of liability for contaminants it conveyed to  
24 the San Diego Bay. The Ninth Circuit made clear that the Clean Water Act "does not distinguish  
25 between those who add and those who convey what is added by others—the Act is indifferent to  
26 the originator of water pollution." *NRDC*, 636 F.3d 1235, 1252-53. In fact, according to the  
27 Ninth Circuit, the Clean Water Act bans "the discharge of any pollutant by any person" regardless  
28 of whether that "person" was the root cause or merely the current superintendent of the

1 discharge.” *Id.* at 1253 (internal quotations and citation omitted). Thus, as the Fifth Circuit has  
2 held, so long as the MS4 is “the means by which the pollutants are ultimately deposited into a  
3 navigable body of water,” the party can be held liable for those discharges, regardless of any  
4 permit. *Sierra Club v. Abston Constr. Co.*, 620 F.2d 41, 45-46 (5th Cir. 1980).

5 Accordingly, so long as there is sufficient evidence, either direct or circumstantial, to find  
6 that the Port District’s SW4 outfall has contributed to elevated levels of pollution at the Site, the  
7 DTR’s conclusion is correct.

8 **C. Substantial and Reasonable Evidence Supports the DTR’s Assertion That the**  
9 **Port District’s SW4 Outfall has Contributed to Elevated Levels of Pollution at**  
10 **the Site**

11 The DTR properly concludes that the Port District’s SW4 outfall has contributed to  
12 elevated levels of pollution at the BAE Systems Leasehold. The Port District does not dispute  
13 that it has MS4 facilities that lead to SW4. (Port District’s comments at 17.) In fact, the Port  
14 District’s (untimely) proffered expert opinion of Mr. Collacott<sup>4</sup> admits that the “portion of the Port  
15 District that is not leased to tenants and is tributary to outfall SW4 is limited to portions of Belt  
16 Street (approx. 1 acre) consisting of an estimated one-half mile (1/2 mile street) of curb and  
17 gutter, four storm drain inlets, and an estimated 770 feet of underground storm drains 24-inches in  
18 diameter and smaller.” (Declaration of Robert Collacott In Support of the San Diego Unified Port  
19 District’s Submission of Comments, Evidence and Legal Argument, at 4:9-14.) Presumably the  
20 Port District has owned and operated this tributary system to outfall SW4 since 1962.

21 SW4 has historically received runoff from Belt Street (among other areas). (DTR, p. 11-  
22 6.) That fact, coupled with the Port District’s own statements regarding the scope of portions of  
23 its MS4 facilities, reflects an *admission* by the Port District that municipal wastewater from its  
24 own MS4 facilities is discharged into SW4 where it is discharged to the Site at the BAE  
25 Leasehold. As reflected below, substantial and reasonable evidence exists that supports the  
26 DTR’s MS4 allegations and findings against the Port District. Importantly, “a regional water  
27 board shall “[u]se any relevant evidence, *whether direct or circumstantial*” in order to establish

28 <sup>4</sup> BAE Systems objects to and is concurrently moving to exclude the untimely and improper expert opinions of all three Port District expert declarations submitted as part of its May 26, 2011 Comments.

1 the source of a discharge. State Water Board Resolution No. 92-49, at § II(A) (emphasis added).

2 **1. 2009 SW4 Sampling Data Detects PCBs, Copper, TBT and Mercury**

3 On December 7, 2009, water quality data from SW4 were collected from a manhole on the  
4 BAE leasehold. (Calscience Environmental Laboratories, 2009). This sample was collected from  
5 the first manhole inside the BAE Systems leasehold, prior to any possible input from the site.  
6 Laboratory analyses included a congener-level analysis of PCBs. Multiple congeners were  
7 detected, and the highest concentrations were of penta- and hexa-chlorinated biphenyls, similar to  
8 the profile of Aroclor 1254. (*Id.*) Copper, mercury, and TBT were also measured and detected in  
9 the urban stormwater conveyed by SW4. (*Id.*) These data indicate that as of 2009 there was an  
10 ongoing source of PCBs, copper, mercury and TBT from urban runoff that discharged to the Site  
11 at SW4. No data suggests that contaminants found in late 2009 have dissipated, nor have upland  
12 source control measures been established, and therefore it is reasonable to conclude that MS4 and  
13 outfall SW4 remain an ongoing source of these COCs to the Site.

14 **2. 2005 SW4 Sampling Data from City Investigation Detects PCBs and**  
15 **PAHs**

16 Further evidence of discharges from storm drain SW4 into the Shipyard sediment site is  
17 provided by the results of a sampling investigation conducted by the City of San Diego. As  
18 described in the DTR (section 4.7.2), on October 3, 2005, the City conducted an investigation and  
19 observed evidence of an illegal discharge into the SW4 catch basin on the north side of Sampson  
20 Street between Belt Street and Harbor Drive, approximately 10 feet east of the railroad line that  
21 runs parallel with Belt Street. Specifically, the catch basin is located immediately to the east of  
22 the BAE Systems' parking lot and the SDG&E Silver Gate Power Plant, which is adjacent to the  
23 parking lot. As noted above, the Port District admits that its own MS4 facilities drain the Belt  
24 Street area and discharge to the Bay via SW4.

25 During the City's investigation, three sediment samples were collected and analyzed for  
26 PCBs and polycyclic aromatic hydrocarbons (PAHs). The first sample was collected from inside  
27 and at the base of a six-inch lateral entering the catch basin from the east. The second sample  
28 was collected from inside and at the base of the 12-inch lateral entering the catch basin from the

1 north. The third sample was collected from the 18-inch pipe exiting the catch basin. The results  
2 of these three samples, presented in DTR Table 4-4, indicate the presence of PCBs and PAHs  
3 entering and exiting the municipal storm drain system catch basin. The results of this sampling  
4 show significant concentrations of Aroclor 1254 and 1260. (DTR Table 4-4.) The Port District  
5 has cited no evidence or even argument to the contrary. Thus this data is further evidence of the  
6 Port District's illicit discharges of contaminants through its MS4 facilities that discharged directly  
7 to the Site.

### 8 3. 2001 SW4 Sampling Data Detects TBT, Copper and Mercury

9 On November 29, 2001, water quality data from SW4 were collected from a manhole on  
10 the BAE leasehold. (AMEC, 2001). This sample was collected from the first manhole inside the  
11 BAE Systems leasehold, prior to any possible input from the site. TBT, copper, and mercury  
12 were all measured and detected in the urban stormwater conveyed by SW4. (*Id.*) These data  
13 indicate that as of late 2001 there was an ongoing source of TBT, copper, and mercury from  
14 urban runoff that discharged to the Site at SW4. No data suggests that contaminants found in late  
15 2001 have dissipated, nor have upland source control measures been established, and moreover  
16 the 2009 SW4 data again detects these same COCs in addition to PCBs, and therefore it is  
17 reasonable to conclude that MS4 and outfall SW4 remain ongoing sources of these COCs to the  
18 Site.

### 19 4. Historical Discharges by the Port District into SW4 have Significantly 20 Contributed to Contamination at the Site

21 In 1974 the Southern California Coastal Water Research Project ("SCCWRP") published  
22 the results of an EPA-funded study entitled "Marine Inputs from Polychlorinated Biphenyls and  
23 Copper from Vessel Antifouling Paints." (Young et al., 1974.) The project surveyed the usage of  
24 PCB-containing hull paint on recreational, commercial, and Navy vessels in San Diego Bay and  
25 other southern California bays, and also collected data on PCB releases in municipal wastewater  
26 and storm runoff. (*Id.*)

27 Contrasting the PCB mass release rates for different sources (Table 12 in Young et al.  
28 1974) shows that municipal wastewater was a major source of Aroclor 1254 to San Diego Bay,

1 contributing more than 99.9 percent of total PCBs. Thus, as of 1974, municipal wastewater  
2 carried by the Port District's MS4 system and discharged via SW4 was a significant source of  
3 PCB contamination at the BAE Leasehold. (*Id.*) The Port District identifies no study or data  
4 indicating that the sources of PCBs to the San Diego Bay was by any means other than those  
5 identified by Young, *et al.* Absent findings to the contrary, it is reasonable to conclude that the  
6 Port District was a significant contributor of PCBs to the San Diego Bay at least from its creation  
7 in 1962 through the 1974 date of the SCCWRP study, and likely longer.

8                   5.       **EPA Guidance Confirms that Waste Water Discharged by the Port**  
9                               **District into SW4 has Significantly Contributed to Contamination at**  
                                      **the Site**

10           Relevant EPA guidance supports the DTR's findings with respect to waste in urban storm  
11 water discharged by the Port District into the SW4 outfall at the BAE Leasehold. In 1983 the  
12 EPA published "Results of the Nationwide Urban Runoff Program." The Executive Summary  
13 states that among the many objectives of the National Urban Runoff Program ("NURP") was to  
14 develop analytical methodologies to examine "the quality characteristics of urban runoff, and  
15 similarities or differences at different urban locations" and "the extent to which urban runoff is a  
16 significant contributor to water quality problems across the nation." (EPA, Results of the  
17 Nationwide Urban Runoff Program, Executive Summary at p. 1.) "The NURP studies have  
18 greatly increased our knowledge of the characteristics of urban runoff, its effects upon designated  
19 uses, and of the performance efficiencies of selected control measures." (*Id.* at p. 2.) The NURP  
20 Final Report reached several relevant conclusions, including:

- 21           • "Heavy metals (especially copper, lead and zinc) are by far the most prevalent  
22           priority pollutant constituents found in urban runoff. End-of-pipe concentrations  
23           exceed EPA ambient water quality criteria and drinking water standards in many  
                  instances. Some of the metals are present often enough and in high enough  
                  concentrations to be potential threats to beneficial uses." (*Id.* at p. 5.)
- 24           • "Total suspended solids concentrations in urban runoff are fairly high in  
25           comparison with treatment plant discharges. Urban runoff control is strongly  
26           indicated where water quality problems associated with TSS, including build-up  
                  of contaminated sediments, exist." "[T]he problem of contaminated sediment  
                  build-up due to urban runoff...undeniable exists." (*Id.* at p. 6.)
- 27           • "A summary characterization of urban runoff has been developed and is believed  
28           to be appropriate for use in estimating urban runoff pollutant discharges from  
                  sites where monitoring data are scant or lacking, at least for planning level

1 purposes." (*Id.* at p. 7.)

2 With respect to this last conclusion regarding the development of a summary  
3 characterization, the NURP Report states that "[a]lthough there tend to be exceptions to any  
4 generalization, the suggested summary urban runoff characteristics given in Table 6-17 of the  
5 report are recommended for planning level purposes as the best estimates, lacking local  
6 information to the contrary." (*Id.* at p. 7.) "[I]n the absence of better information the data given  
7 in Table 6-17 are recommended for planning level purposes as the best description of the  
8 characteristics of urban runoff." (EPA, Results of the Nationwide Urban Runoff Program,  
9 Volume I – Final Report, at p. 6-43.) Those characteristics of urban runoff include the presence  
10 of significant levels of pollutants including total suspended solids, heavy metals, inorganics, and  
11 pesticides. (*Id.*, at Tables 6-17 through 6-21.) The NURP data supports and confirms the DTR's  
12 assertion that:

13 "The Port District has caused or permitted the discharge of urban  
14 storm water pollutants directly to San Diego Bay at the Shipyard  
15 Sediment Site. The pollutants include metals (arsenic, cadmium,  
16 chromium, copper, lead, mercury, nickel, silver, and zinc), TSS,  
17 sediment (due to anthropogenic activities), petroleum products, and  
18 synthetic organics (pesticides, herbicides, and PCBs) through its  
19 SW4 (located on the BAE Systems leasehold) and SW9 (located on  
20 the NASSCO leasehold) MS4 conduit pipes."

21 (DTR, § 11.4.)

22 The NURP data also supports and confirms the DTR's assertion that "it is highly probable  
23 that historical and current discharges from [SW4] outfall have discharged heavy metals and  
24 organics to San Diego Bay at the Shipyard Sediment Site." (DTR § 11.6.4.)

25 **V. PORT DISTRICT'S UNTIMELY AND IMPERMISSIBLE EXPERT**  
26 **DECLARATIONS**

27 As set forth in BAE Systems' concurrently filed Motion to Exclude Declarations of the  
28 Port District's Experts Michael Johns, Ph.D., Ying Poon, D.SC., and Robert Collacott, MBA  
M.S., the Regional Board should exclude and strike those untimely and impermissible expert  
opinion, and should disregard those portions of the Port District's May 26, 2011 comments that  
rely upon and discuss that expert opinion.

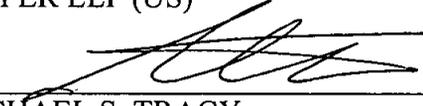
1 In the event the Regional Board declines to grant BAE Systems' motion to exclude, BAE  
2 Systems joins in NASSCO's Reply to Comments by the San Diego Unified Port District filed on  
3 June 23, 2011 with respect to the substance of those three expert declarations.

4 **VI. CONCLUSION**

5 Because the Port District has not demonstrated that the parties have sufficient assets to  
6 pay for the cleanup, the Port District's comments regarding secondary liability are unpersuasive.  
7 Furthermore, the DTR properly names the Port District as a discharger because there is  
8 substantial and reasonable evidence that both historically and currently uncontrolled upland  
9 sources discharging via urban runoff via SW4 are likely to be major contributors of pollutants to  
10 the Shipyard Site. For all of the foregoing reasons, the arguments Port District's comments  
11 should be disregarded.

12  
13 Dated: June 23, 2011

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